

**INSTITUTIONAL SUPPORT
TO
THE MALAWI MINISTRY OF TRANSPORT

INLAND WATERS AND SHIPPING

LEGAL FRAMEWORK**

Submitted to:
USAID/Malawi
Lilongwe, Malawi

Prepared for:
Institutional Reform and the Informal Sector (IRIS)
2105 Morrill Hall
University of Maryland, College Park
College Park, MD 20740

Prepared by:
Nathan Associates
(through Consilium Legis (Pty) Ltd)
828 Arcadia St
Pretoria, South Africa

**Malawi Ministry of Transport Project
Contract: PCE-1-00-97-0042-00
Task Order: 805**

**SUMMARY OF FINDINGS AND RECOMMENDATIONS:
INLAND WATERS & SHIPPING**

The Inland Waters Shipping Act provides an adequate framework for safety regulation of lake shipping and poses no impediment to the concessioning of the lake service or ports. However, current licensing requirements for lake services are in conflict with NTP objectives of market liberalization and should be repealed prior to initiating service concessions or other commercial reform. The Act does not provide an adequate regulatory framework for commercialized or privatized ports and minimum rules are required regarding the power to concession ports and establish an appropriate regulatory framework for port safety based on ministerial regulation.

RECOMMENDATION	MOTIVATION	IMPLEMENTATION REQUIREMENTS	PRIORITY
1. Scrap provisions in Inland Waters Shipping Act 1995 (IWSA) providing for economic regulation of lake shipping services (including IWSA (Licensing of Vessels) regulations.	Existing provisions conflict with NTP objective of promoting private investment in lake shipping services and ensuring commercial autonomy for shipping lines in respect of rates, services types, service frequency, etc.	Repeal Part IV of the IWSA and regulations (see Annex 1).	Legislative reform to be undertaken as a priority and must be completed before the concessioning / privatization process is initiated.
2. Expand the authority of the Minister to conclude appropriate international agreements regarding the international lake services and related safety aspects	Provisions mandating the Minister to conclude agreements should be expanded to provide maximum flexibility in terms of the potential subject-matter of agreements. Provision should also be made for a flexible incorporation procedure which obviates the need for cumbersome parliamentary ratification procedures. Finally, the Minister should be empowered to enforce reciprocity and take action against foreign shipping lines where Malawian carriers are subjected to less favourable treatment.	Amend Sec 43 of the IWSA (See 3.4)	Amendments are not of immediate importance but, if possible, should be introduced as a part of a legal reform package along with the recommendations contained in 1. above.
3. Additional provisions are required to address regulatory requirements in respect of privatized or concessioned ports, which may be accommodated chiefly through regulations issued by the Minister.	The IWSA contains limited port-related provisions and will not meet future needs in terms of the Ministry's regulatory role in overseeing private commercial port operations.	Adopt appropriate provisions on the basis of legislative provisions contained in Annex 2.	The comments made under 2 above apply.

1. **BACKGROUND**

1.1 The legal framework for the Malawi inland waters and shipping sub-sector comprises:

- ⌚ the Inland Waters Shipping Act, 1995 (IWSA); and
- ⌚ regulations made in terms of the IWSA.

In addition, other pertinent legislation is:

- ⌚ the Public Enterprises (Privatization) Act, 1996;
- ⌚ the Competition and Fair Trading Act, 1998; and
- ⌚ the Environmental Management Act, 1996.

1.2 INLAND WATERS SHIPPING ACT, 1995

The IWSA is the principal legislation applicable to this sector. It comprises 14 parts:

Part I: Preliminary
 Part II: Survey and Registration
 Part III: Mortgages, Alteration and Transmission
 Part IV: Licensing Arrangements
 Part V: Bilateral and Multilateral Arrangements
 Part VI: Surveys and Inspections
 Part VII: Manning Levels
 Part VIII: Safety Provisions
 Part IX: The Crew
 Part X: Dangerous Goods and Unseaworthy Vessels
 Part XI: Wrecks and Salvage
 Part XII: Inquiries and Legal Process
 Part XIII: Miscellaneous
 Part XIV: Repeal and Savings

1.3 The IWSA is supplemented by the following regulations:

- ⌚ Inland Waters Shipping (Survey and Registration) Regulations;
- ⌚ Inland Waters Shipping (Licensing of Vessels) Regulations;
- ⌚ Inland Waters Shipping (Masters and Crews) Regulations;
- ⌚ Inland Waters Shipping (Harbours) Regulations;
- ⌚ Inland Waters Shipping (Tonnage and Dimension) Regulations;
- ⌚ Inland Waters Shipping (Safety Appliances and Construction of Vessels) Regulations; and
- ⌚ Inland Waters Shipping (Log Books) Regulations.

1.4 INLAND WATERS SHIPPING (SURVEY AND REGISTRATION) REGULATIONS

The regulations provide for the survey and registration of vessels, and for the issuance of Surveyor's certificates and certificates of registration. Provision is made for the registrar of vessels

to keep a register. The allocation of identity marks to vessels and the exhibition of names on vessels, are also regulated.

1.5 INLAND WATERS SHIPPING (LICENSING OF VESSELS) REGULATIONS

The regulations provide for the issuance and variation of licences by the Licensing Authority. It prescribes that every vessel which has been issued with a licence should display it in a conspicuous place. Provision is made for expired, revoked or suspended licences to be surrendered to the Licensing Authority. Offences and the correlating penalties are also prescribed.

1.6 INLAND WATERS SHIPPING (MASTERS AND CREWS) REGULATIONS

The regulations prescribe that certain vessels be under the command of a competent master, as well as regulating the minimum qualification requirements for masters and crew members of vessels. Provision is made for certificates to be issued by the Minister, to applicants who have passed the appropriate examination.

1.7 INLAND WATERS SHIPPING (HARBOURS) REGULATIONS

The regulations provide for a harbour master to give directions in relation to the control of vessels in harbours and the loading / unloading of cargoes. Provision is also made for the harbour master to delegate his powers to an assistant or deputy.

1.8 INLAND WATERS SHIPPING (TONNAGE AND DIMENSION) REGULATIONS

The regulations prescribe the manner in which the tonnage and dimensions of vessels should be assessed, with specific reference to the length, breadth, girth and depth dimensions of the vessel. A method is also prescribed for the measurement of open vessels.

1.9 INLAND WATERS SHIPPING (SAFETY APPLIANCES AND CONSTRUCTION OF VESSELS) REGULATIONS

The regulations prescribe conventional standards for different types of vessels, relating to design, construction and equipment. Provision is made for plans to be submitted to the Surveyor, if required. Some of the areas covered also comprise alternate means of propulsion, anchors and cables, radio apparatus to be carried, and the appointment of boatmen.

1.10 INLAND WATERS SHIPPING (LOG BOOKS) REGULATIONS

The regulations provide for the masters of certain vessels to keep log-books, for purposes of recording offences, illnesses and casualties which occurred on board vessels.

1.11 PUBLIC ENTERPRISES (PRIVATIZATION) ACT, 1996

This act establishes the Privatization Commission as the sole authority to implement the privatization of direct or indirect government ownership of any enterprise. The Commission reports directly to cabinet. Privatization occurs in terms of a divestiture sequence plan which identifies those enterprises with a commercial orientation which will be the subject of privatization. Enterprises not considered to have a commercial orientation will revert to the control of the appropriate ministry. As part of this process, the act also mandates the commercialization of any

government department.

1.12 COMPETITION AND FAIR TRADING ACT, 1998

The Act establishes the Competition and Fair Trading Commission with the broad functions of regulating, monitoring, controlling and preventing any act which adversely affects competition or fair trading. The act prohibits anti-competitive trade practices and permits the commission to control mergers and takeovers and regulates the relationship between suppliers of goods and services and consumers. For the purpose of promoting a fair competition regime, the commission may conduct investigations and convene hearings and generally take such action as it deems necessary to achieve the objects of the Act.

1.13 The IWSA provides a broad framework within which a variety of matters related to the merchant shipping industry are regulated. These matters can be summarized as:

- C Seaworthiness of ships and safety of navigation and cargoes
- C Competency of crews
- C Working conditions of crews
- C Shipping inquiries
- C Market liberalization
- C International relations

It is noteworthy that the rules in respect of the first 4 matters listed above are generally determined in international instruments prepared under the aegis of the International Maritime Organization (IMO). In so far as Malawi is a member of the IMO, the incorporation of IMO rules in her national legislation gives effect to her international obligations as a member of that body.

In contrast with the incorporation of international rules, the provisions on **market liberalization** and **international relations** are informed by domestic policy decisions. For the purposes of this report, the analysis focusses on the latter, as well as the issue of **private investment in ports**.

2. MARKET LIBERALIZATION

2.1 POLICY

The NTP adopts the general objective to:

“Encourage the private sector to promote the development and operation of an economically justified transport system for lakes and major rivers” and to this end proposes the following strategies:

- C “create an enabling environment that will encourage the private sector to invest in this sector” and
- C “promote private participation in maritime operations and infrastructure under concessionary arrangements”.

Specific NTP objectives are to:

“Encourage the continued operation and strengthening of the lake shipping network to meet national and regional requirements, including lakeshore areas” and to this end adopts the following strategies:

- C “promote the involvement of the private sector in the operation of lake shipping services”; and

- C “ensure that operators of lake shipping services have complete autonomy in aspects such as the setting of tariffs, determining staff levels, and freedom to initiate, drop or alter the nature and frequency of services”.

The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to encourage:

“the promotion of ship-owning” (Art 8.2.1 (d));

“the growth and development of a viable SADC merchant shipping industry (Art 8.2.1(e));
and

“efficiency in maritime transport and ...inland waterways” (Art 8.2.1(f)).

2.2 STATUS QUO NARRATIVE

The relevant provisions of Part II of the IWSA are:

- C Application of Part II (Sec 4);
- C Obligation to register (Sec 5);
- C Application for registration (Sec 6);
- C Declaration of ownership (Sec 7);
- C First registration (Sec 8);
- C Marking of vessels (Sec 9);
- C Survey of vessels (Sec 10);
- C Register of vessels (Sec 11);
- C Port of registration (Sec 12);
- C Liability of registered owners (Sec 13);
- C Issue of certificate of registration (Sec 14);
- C Custody of certificate of registration (Sec 15);
- C Lost certificate of registration (Sec 16);
- C Surrender of certificate of registration (Sec 17);
- C Duration renewal of certificate of registration (Sec 18);
- C Wrecked and abandoned vessels (Sec 19);
- C Amendment in certificate of registration and register (Sec 20);
- C Conditions of licences (Sec 20);
- C Re-registration of wrecked and abandoned vessels (Sec 21); and
- C Masters and crews of vessels (Sec 22).

The relevant provisions of Part IV of the IWSA are:

- C Licensing authority (Sec 30);
- C Licensing of vessels used for water transport (Sec 31);
- C Using vessels in contravention of sec 31 (Sec 32);
- C Duration of licence (Sec 33);
- C Licence not transferable (Sec 34);
- C Form of licence (Sec 35);
- C Procedure for application for licence (Sec 36);
- C Objection to application for licence (Sec 37);
- C Discretion of the licensing authority to grant or refuse licences (Sec 38);
- C Condition of licences (Sec 39);
- C Power to revoke or suspend licences (Sec 40); and
- C Provision for appeals in connection with licences (Sec 41).

Viewed collectively, the IWSA provides for regulated access to the lake shipping market. In practice, a threefold procedure is undergone consisting of:

- C **survey** of the vessel;
- C **registration** of the vessel; and
- C **licensing** of the shipping service provider.

The procedures relating to the **survey** and **registration** of the vessel are respectively intended to ensure the use of seaworthy vessels and to establish the ownership of a vessel in the public register.

A survey must be undertaken prior to the first registration of a vessel and thereafter at intervals determined by the Chief Surveyor. In the case of passenger vessels, surveys must take place periodically at intervals of not more than one calendar year.

In addition to determining the general seaworthiness of a vessel and the adequacy of equipment carried on board, a surveyor may determine:

- C the geographical limits or areas outside which a vessel may not be used having regard to her construction, suitability for navigation and safe operation; and
- C the maximum number of passengers or quantity of cargo which may be carried.

As part of a survey, a determination is also made regarding number and competency of the crew to be carried on a vessel. In this regard, the crew detail of various vessels are laid down in the Inland Water Shipping (Masters and Crews) Regulations.

The features of the **licensing** procedure are the following:

- C Any person wishing to use a vessel on the inland waters to carry goods or passengers for hire or reward or in connection with any trade or business is required to have a licence issued by a licencing authority in the person of an officer appointed by the Minister.
- C Applications for licences must be submitted in writing providing information on:
 - S the type of vessel to be used, its construction and motive power;
 - S the total number of crew to be carried;
 - S the total number of passengers it is intended to carry;
 - S the places it is intended to serve; and
 - S any other information as may be required by the licensing authority.
- C An application is published in the *Gazette* and objections may be lodged against the granting of the application.
- C The licensing authority is granted the full discretion to grant or reject an application or to grant it under such conditions as it deems fit. The IWSA particularly charges the licensing authority to have regard to objections by person who are already providing a service between the same places which the applicant intends to serve.
- C In exercising a discretion, the licensing authority must take into consideration:
 - S the extent to which the proposed service is necessary or desirable in the public interest;
 - S the extent to which it is necessary in the public interest to prevent uneconomic competition with other transport services;

- S the extent to which the route or routes in respect of which the application is made are already served;
 - S the desirability of encouraging the provision of adequate and efficient services;
 - S the desirability of eliminating and preventing the growth of unnecessary or unremunerative services;
 - S the co-ordination of all forms of passenger and goods transport;
 - S the interest or interests of those requiring as well as those providing facilities for transport;
 - S the applicant's reliability, financial stability and the facilities at his disposal for carrying out the proposed services; and
 - S the condition of the vessel in respect of which the application is made and the fitness of such vessel for the purpose for which the applicant intends to use it.
- C Various conditions may be attached to a licence:
- S a condition that the vessel in respect of which it is issued shall or shall not be used in a specified area or over specified routes;
 - S a condition that certain classes or descriptions of goods shall or shall not be carried;
 - S a condition specifying the charges or the maximum or minimum charges to be made for the carriage of goods and passengers;
 - S a condition specifying the maximum laden weight of such vessel;
 - S a condition that passengers may or may not be carried; and
 - S a condition specifying the maximum number of passengers which may be carried.
- C The licensing authority may revoke or suspend a licence where any conditions of a licence have not been complied with or vary the conditions of a licence.
- C Provision is also made for appeals to the Minister:
- S by an applicant against the decision of the licensing authority on an application for a licence;
 - S by an objector, against the decision of the licensing authority; or
 - S by the holder of a licence, against a decision to revoke or suspend a licence or vary its conditions.

In terms of the IWSA, the Minister's decision is final, but in theory it could still be subject to review by a competent court.

2.3 STATUS QUO ANALYSIS

2.3.1 Competition

- C The licensing system provided for in the IWSA is highly restrictive of competition and is a classical example of the traditional form of **economic regulation**. In theory, the IWSA rules oblige the licensing authority to consider any objections from established market participants and would generally need to favour the latter by refusing market access to new entrants. The factors which the licensing authority would be obliged to consider in evaluating an application potentially place a heavy burden on the applicant in terms of presenting evidence to justify the granting of an application. In many cases, an applicant would have difficulty in gathering the type of evidence needed to refute the objections which established market participants could present. It cannot, therefore, be concluded that lake service providers have the freedom to “initiate” services and in this respect the IWSA directly conflicts with the policy objective of the NTP.
- C Once a licence is granted, the IWSA further provides wide authority for a number of restrictive conditions to be imposed on a service provider who obtains a licence. In particular, **tariff regulation** may be imposed, as well as **route restrictions**. Moreover, the licencing authority may further restrict commercial freedom by prescribing the nature of cargoes that may be carried.
- C In practice, the licensing system provided for in the IWSA has largely fallen into disuse. Although licences are still issued, there is no application of the economic criteria which could serve to regulate market entry. The Minister has not appointed a “licensing authority” as required by the Act and in practice, the duties of the licensing authority are performed by the ship surveyors as part of their safety functions. The issuing of licences appears to have largely become a formality once a ship complies with survey requirements. The non-application of the economic regulatory rules has apparently been prompted by the lack of capacity within the Marine Department of the Ministry to enforce the IWSA provisions. Moreover, the market for regular shipping services on the lake is small and it appears that apart from the established service, other service providers are small, informal businesses operating on an *ad hoc* basis in response to market demand. The absence of economic regulation is, therefore, also possibly a result of the current market profile. Notwithstanding the non-application of the current IWSA provisions, the regulatory approach in Part IV is directly in **conflict** with the NTP strategy aimed at liberalizing the market in lake shipping services. **In the absence of a repeal of Part IV, the continued provision for a system of economic regulation in the IWSA presents a potential obstacle to the promotion of a competitive environment once the lake service is concessioned.**

2.3.2 Safety

- C Safety of shipping and navigation is ensured by the requirement that a ship be surveyed by the Chief Surveyor or his designate prior to first registration.
- C The power vested in a surveyor to determine the crew to be carried on a vessel appears to conflict with the stated strategy of the NTP that lake service providers must have the freedom to determine staff levels. In the case of managerial and administrative staff, this objective is clearly intended to confirm the commercial freedom of the service provider. This contrasts with the regulation of manning levels, which has a primary safety purpose and occurs in terms of IMO rules (in so far as these apply to shipping on inland waters).
- C It may be noted that the conditions which may be stipulated as part of the surveying and licensing procedures (compare Secs 10(3) and 30(2)) appear to overlap. Under both procedures, conditions may be imposed relating to the maximum number of passengers and the maximum quantity of cargo or laden weight of a vessel. These considerations have a clear safety focus and should only be relevant when a vessel is surveyed. The conflicting focuses of the two procedures will, however, be rectified if the recommendations made under 2.4 are implemented. This may require that the design of

the current survey certificate contained in the Inland Waters Shipping (Survey and Registration) Regulations be revised.

2.3.3 Users

- C Outside of the **safety** aspects, there are no specific provisions in the IWSA aimed at protecting the commercial interests of users. While the regulation of **tariffs** is theoretically possible and clearly intended as a form of user protection, rates have not been regulated in practice. Nevertheless, the conclusion reached under 2.3.1 regarding the conflict between the current IWSA provisions and the NTP remain valid.
- C In common with other transport modes, the Competition and Fair Trading Act, 1998, also applies to the shipping sector and provides an adequate framework within which anti-competitive practices may be addressed. As the Act is of recent origin, its true effectiveness will only become apparent over time.

2.3.4 Regulatory framework

- C In theory, the IWSA creates more than one regulatory entity. In respect of **safety** issues, the regulator is the Chief Surveyor. By contrast, **economic** regulation is undertaken by the licensing authority who is a “public officer” or “public officers” appointed by the Minister. As pointed out above, in practice, the Minister has not appointed any officers to perform licensing authority functions, and surveyors have assumed the licensing function as part of the safety certification of vessels.
- C In so far as the rules on economic regulation are not applied, this confirms the NTP objective of deregulating and retaining only a regulatory focus on **safety**. This approach will have the further benefit of reducing or eliminating the broad regulatory discretion which could be applied under the licensing procedure (ie economic regulation), and providing a narrow focus to regulatory intervention based on objective safety criteria. At the same time, the number of administrative processes (ie “red tape”) applicable to market entrants, will be reduced.
- C In so far as **safety** regulation occurs within the context of established IMO rules, an international benchmark is established which serves as a guarantee for a fair and due process.

2.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

- C Part IV of the IWSA and the Inland Waters Shipping (Licensing of Vessels) Regulations, be repealed.

3. INTERNATIONAL RELATIONS

3.1 POLICY

The NTP adopts the objective to:

“foster increased participation by the Malawian private sector in international shipping in order to contribute to economic development and the promotion of foreign trade”.

To this end, the following strategies are proposed:

“to ratify and enact International Maritime Conventions that are relevant to Malawi requirements”; and

“maintain selective membership in international organizations and strengthen bilateral and multilateral agreements”.

3.2 STATUS QUO NARRATIVE

The IWSA permits the Minister to conclude agreements with another state bordering on a lake or river which has been declared an inland waterway in terms of the Act.

The relevant provisions of Part V of IWSA are:

- C Agreements with other countries (Sec 43); and
- C Existing treaty obligations paramount (Sec 44).

An agreement may provide for:

- C mutual recognition of documentation in relation to vessels, master and crew;
- C the use of foreign-registered vessels in Malawi inland waterways or the use of such vessels after having been registered in terms of the Act;
- C the recognition and effect of any bilateral or multilateral agreements entered into by Malawi;
- C the safety of passengers, crew and property aboard and the safety of navigation of vessels on inland waterways and on the waters of a foreign country;
- C access by commercial vessels to the inland waterways and ports of Malawi and vice-versa; or
- C any other matter incidental to Part V of the Act.

The Minister may suspend any provisions of the IWSA in so far as it may be necessary to ensure that Malawi complies with any obligation assumed in terms of the provisions of an international agreement.

The IWSA contains no provisions providing for an international agreement concluded by the Minister to have force of law upon conclusion. Although the Minister may, under common law, conclude international agreements as a member of the executive, such agreements only bind Malawi in terms of international law and do not necessarily have domestic legal force. In terms of Sec 211 of the Malawi Constitution, an agreement required to have domestic legal force must be ratified by an Act of Parliament.

3.3 STATUS QUO ANALYSIS

3.3.1 Competition

- C The provisions discussed above are progressive to the extent that they acknowledge the need for the Minister to conclude agreements with other states regarding lake shipping services. However, a number of areas in which it would be appropriate for the Minister to conclude agreements have not been mentioned. These include:

- S search and rescue;
- S co-operation in port state control, ie surveying of ships;

- S co-operation in hydrographic surveying;
- S joint training of surveyors and seafarers;
- S co-operation in environmental protection;
- S harmonization of laws, documentation and administrative procedures.

Moreover, given the comments made above, agreements should favour market liberalization and not introduce licensing requirements akin to those contained in Part IV of the IWSA.

- C By the same token, provision should be made that agreements will have legal force in order to facilitate both implementation of the original agreement and subsequent amendments. In the case of IMO agreements and rules, the latter display a high degree of dynamism and are constantly subject to development and refinement.

3.3.2 Safety

- C The above provisions allow for agreements to be concluded with a safety object. However, the provisions are vague in terms of a number of crucial safety aspects which could potentially be the subject of international agreements, eg:

- S co-operation in search and rescue;
- S joint training and sharing of training facilities;
- S mutual assistance in the execution of port state control;
- S co-operation in hydrographic surveys,
- S co-operation in the combatting of pollution and collaboration in preparing and implementing oil spill contingency plans etc.

3.3.3 Users

- C No specific reference is made to user interests. In line with the approach proposed under 3.3.2, the IWSA should be supplemented to allow the Minister maximum flexibility to conclude agreements which also promote user interests, eg with reference to aspects such as:

- S promotion of co-operation and liaison between regional user bodies, eg shippers councils; and
- S encouraging regional collaboration in the provision of shipping and port services.

3.3.4 Regulatory system

- C The current provisions depart from the assumption that the same regulatory system will apply to both Malawian and foreign-registered vessels. To the degree that such regulation occurs in terms of IMO rules, this will not be anti-competitive and is in line with international practice. Where agreements also address economic aspects, it is advisable that the IWSA specify criteria to guide the content of such agreements. Examples of the latter would be the need for:

- S non-discrimination and equal treatment;
- S reciprocal recognition; and
- S extraterritorial jurisdiction.

3.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

The IWSA (Sec 43) be amended as follows:

“(1) Subject to subsection (2), the Minister may, under such conditions as he may deem necessary, conclude agreements consistent with this Act with the government of any country which border on any lake or river of which a part has been declared to be inland waters and in any such agreement may make arrangements -

- (a) for the recognition and effect in such country of documents issued for the purposes of this Act, and for the recognition and effect in Malawi of documents issued in such country in relation to vessels, master and crew;
- (b) for the use on inland waters of vessels registered in such country and the use on the inland waters of such vessels registered under this Act;
- (c) for the recognition and effect of any bilateral or multilateral arrangements and treaties or agreements on regional co-operation entered into or to be entered into by the Government of Malawi;
- (d) for the safety of passengers, crews and property aboard and the navigation of vessels used on inland waters and on the waters of such country;
- (e) for access, by commercial vessels, to inland waters and ports of Malawi by vessels registered in such country and by Malawi vessels to inland waters and ports of such country;
- (f) regulating market entry on the basis of compliance with safety requirements;
- (g) co-operation in search and rescue;
- (h) mutual assistance in port state control;
- (i) co-operation in the environmental protection of inland waters;
- (j) co-operation in undertaking hydrographic surveys;
- (k) harmonization of legislation, documentation and administrative procedures;
- (l) joint training of marine safety personnel and of seafarers; or
- (m) any other matter related to the safety of navigation or the promotion of the economic feasibility of shipping services [for any other matters incidental to this Part].

(2) Where any agreement or part thereof is required to have force of law in Malawi, the Minister must table such agreement in Parliament within 15 days of the signing thereof if Parliament is in session, or within 15 days after Parliament has reconvened, if Parliament is not in session.

(3) Unless Parliament adopts a resolution to the contrary within 30 days of the tabling of an agreement in terms of subsection (2), such agreement shall have force of law in Malawi as if it has been ratified in terms of section 211 of the Malawi Constitution.

Drafting note: An alternative procedure has also been adopted in some Malawi legislation (ie the Forestry Act, 1996, the Fisheries and Conservation Act, 1997 and more recently in amendments to the National Parks and Wildlife Act, 1997) providing for incorporation of international agreements in domestic law. This procedure authorizes the Minister, by order published in the *Gazette*, to specify measures for the proper implementation of relevant provisions of any

convention (which is defined in the Interpretation Act as any bilateral or multilateral international agreement) to which Malawi is a party (The first of such orders is currently under consideration by the Attorney-General's chambers). This approach is interpreted as complying with the provisions of Sec 211 of the Constitution in terms of which an Act of Parliament is required to ratify any convention which is intended to have domestic legal force.

Equal treatment and reciprocity

43A. (1) The Minister may, when any country accords treatment to a Malawian shipping service provider which is less favourable than the treatment which is being accorded by Malawi to shipping service providers from that country, by 30 days notice in a newspaper of general circulation, despite any provision to the contrary in this or any other Act or any agreement concluded with such country, apply treatment to the shipping service providers of that country which is equivalent to the treatment which that country accords Malawian shipping service providers.

(2) The Minister may at any time amend or withdraw a notice referred to in subsection (1) by notice in a newspaper of general circulation.

Incorporation of conventions of International Maritime Organization

43B. (1) Subject to section 43(2) and (3), the Minister may incorporate the provisions of any international convention to which Malawi has acceded -

- (a) through the inclusion of the text of such convention in a schedule to this Act where the circumstances in subsection (2)(a) apply; or
- (b) by prescribing the provisions of such convention in regulations where the circumstances contemplated in subsection (2)(b) apply.

(2) The Minister must -

- (a) incorporate the text of a convention as a schedule to this Act, where such convention -
 - (i) amends an existing law;
 - (ii) creates rights, confers powers or imposes duties; or
 - (iii) is required to have the force of law for whatever reason; or
- (b) incorporate the text of a convention in regulations where such convention -
 - (i) prescribes administrative or other procedures; or
 - (ii) contains optional provisions.

(3) Nothing in this section prohibits the incorporation of a part or parts of a convention in a schedule or a regulation, or in both a schedule and a regulation, as the case may be.

4. PRIVATE INVESTMENT IN PORTS

4.1 POLICY

The NTP adopts the objective to:

“commercialize and privatize ports and improving cargo handling equipment and infrastructural

availability and reliability”; and

“improving port productivity, ... (and) operational efficiency”, and to this end adopts the following strategies:

“undertake port reform”;

“ensure that port facilities are adapted to meet the challenges of modern shipping technologies”; and

“develop an appropriate port infrastructure”.

4.2 STATUS QUO NARRATIVE

The IWSA contains only limited provisions dealing with ports.

Sec 42:

C permits the Minister to declare any lake, river or area of water an “inland water” and designate places or areas of inland waters or land as harbours; and

C make regulations for the management, control and safety of such inland waters and harbours and of vessels, persons and cargo in ports and in respect of fees charged for services provided in harbours.

The Inland Waters Shipping (Harbours) Regulations comprise 4 parts dealing respectively with:

C Part I: Preliminary

C Part II: Control of Vessels in Harbours

C Part III: Loading or Unloading Cargoes

C Part IV: General (addressing issues relating to warehouses, trespass, entry to harbours, firefighting, etc).

The regulations are limited to dealing with aspects related to the day-to-day operation of harbours to ensure safe and efficient navigation and working of ships. No regulations have been made prescribing fees for services provided in harbours as envisaged in Sec 42.

4.3 STATUS QUO ANALYSIS

C Private investment in ports or the privatization of existing ports is not addressed in the IWSA, but may be undertaken in terms of the PEPA. The Privatization Commission is empowered to sell off state assets, which would include port infrastructure, eg wharves and jetties and port equipment, eg cranes. As has been noted elsewhere, the PEPA is aimed at achieving the **once-off** divestiture of government assets, but does not provide a framework for the long-term management of the sub-sector within a commercial environment. There is a need for a basic legal framework which provides a firm basis for a wide range of port concessions, including in a scenario where the Privatization Commission may have disbanded and may no longer be able to undertake the function.

C Notwithstanding the benefits derived from commercialising port operations, there are several important considerations why a basic set of legal rules should be in place to apply in respect of commercialized or privatized ports:

S Ports remain strategic **public assets** in which there is a public interest from both a commercial, safety and environmental perspective.

- S Port operators will generally function in a rational manner and ensure **safe** operations. This will be necessary to ensure that a port continues to attract business, especially where it competes for such business with other transport modes. However, conditions may exist which prompt a port operator to ignore or not comply fully with safety rules. In order to prevent such an occurrence, government should have sufficient oversight powers to act as **safety regulator** and enforce compliance in the public interest. Such powers should include the authority to require regular reporting, undertake monitoring action and where necessary remedial action if the failure to meet a safety standard persists.

- S Ports are often natural **monopolies**. This characteristic is not necessarily detrimental to the market, provided adequate conditions of competition exist, eg from other transport modes. The degree to which this condition is met in Malawi is unclear, but in so far as ports experience competition from road transport, it appears that there are probably adequate competitive conditions to prevent an exploitation of monopoly power by any port. In the absence of such conditions, a possible need may exist to regulate relationships between port operators and port users. Such regulation could occur in terms of ports legislation, but it is unlikely that the Ministry of Transport will develop suitable capacity for this task. The CFTA appears to provide an adequate framework within which **commercial relationships** can be regulated within ports. The general anti-competitive provisions of the CFTA could, however, also be supplemented by port-specific rules contained in ports legislation, ie regarding the use of common user terminals. The existence of **port users committees** can play an important role in promoting healthy commercial relationships by providing forums for informal discussion (and dispute resolution) between port operators and users. Where such committees function well, they can reduce the need for regulatory intervention by government (or agencies such as the Competition and Fair Trading Commission) by ensuring that most if not all disputes are resolved between the parties at ground level.

4.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

The current legal framework be supplemented by enabling provisions dealing with the various aspects related to a commercialized port environment. Such provisions should, at a minimum, allow:

- C the concessioning of a port or multiple concessions of parts of a port, eg individual terminals as well as the franchising of individual port services, eg cargo handling; and

- C the Minister by regulation to make rules applicable to:
 - S access to common user facilities and services;
 - S alteration in the use of common user terminals and facilities;
 - S port safety, navigation and conservancy functions;
 - S provision of navigation aids;
 - S development of standards by a concessionaire in respect of fitness of port works and operational equipment; and
 - S establishment of port user committees.

With regard to concessions, it is recommended that the legislation provide a general authority to concession ports without designating the Minister or Ministry who will be responsible for the management of the concessions, so that the government will enjoy the maximum flexibility in terms of allocating responsibility to the most appropriate Minister / Ministry when the need arises. This

approach will accommodate future needs both with reference to a scenario where the Privatization Commission is still in existence and the opposite scenario where it has been phased out.

Legislative provisions which could be used as a basis for the above are included in Annex 2.

ANNEX 1**SUGGESTED LEGISLATIVE TEXT**

Part IV of the Inland Waters Shipping Act is repealed.

SUGGESTED TEXT FOR REPEAL OF INLAND WATERS SHIPPING (LICENSING OF VESSELS) REGULATIONS

The Inland Waters Shipping (Licensing of Vessels) Regulations made under section 37 of the Inland Waters Shipping Act, 1985 (Cap. 71.01) are repealed in terms of section 211 of the Inland Waters Shipping Act, 1995, Act No. 12 of 1995.

ANNEX 2

EXPLANATORY NOTES

1. This annex provides framework provisions for ports which could be applied to a commercialized port. The provisions support the NTP objective which envisages that the existing ports will be concessioned or privatized. The provisions also accommodate a possible scenario where the Privatization Commission may have disbanded and there is a future need to concession (or re-concession) a port.

Definitions

1. *In this Act, unless the context otherwise indicates -*

"Minister" means the Minister responsible for ports;

"port facility" means shipbuilding yards, graving docks, dry docks, breakwaters and related facilities utilized for the provision of services other than the loading and off-loading of cargo and passengers;

"port service" means any service provided within the port limits, including -

- (a) *stevedoring;*
- (b) *warehousing;*
- (c) *shore-based cargo handling;*
- (d) *ship repair;*
- (e) *property management and maintenance;*
- (f) *port road management and maintenance; and*
- (g) *any other port-related service of a commercial nature;*

"port terminal" means terminals, warehouses or other land-based structures used for the loading or offloading of passengers and cargo;

"prescribed" means prescribed by the Minister by regulation;

"safety, navigation and conservancy function" means -

- (a) *inland waterway traffic control;*
- (b) *dredging;*
- (c) *provision of lighthouses and radio navigational aids;*
- (d) *waste reception and disposal;*
- (e) *salvage;*

- (f) *fire-fighting and other emergency services; and*
- (g) *search and rescue services.*

Power to grant concessions and franchises

2. (1) *Subject to the Public Enterprises (Privatization) Act, Act No. 7 of 1996 or any other applicable law-*

- (a) *the management and operation of a port or a part thereof, including an individual port terminal or port facility may be concessioned to any private person or entity; or*
- (b) *the provision of any port service may be franchised to any private person or entity.*

(2) *For the purposes of this section “concession” includes, but is not limited to a management contract or a negative concession.*

NOTE:

1. *In the event that PEPA is repealed, provision will have to be made for transitional arrangements allocating responsibility for overseeing future concessions. The PEPA regulations contain extensive provisions which could be applied to the process of concessioning, (eg pre-qualification, bidding procedures, evaluation of bids, etc) and steps should be taken to retain these even if the institutions created under PEPA are disbanded.*

Regulations

3. (1) *The Minister may, by notice in the Gazette, make regulations in connection with any matter specified in this Act or which he considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved.*

(2) *Without derogating from the general powers referred to in subsection (1), the Minister may make regulations in respect of any matter that may be prescribed in terms of this Act, including -*

- (a) *the conditions for access by any person to common user port terminals, facilities and or port services;*
- (b) *the conditions for the alteration of the use of common user terminals or facilities;*
- (c) *the safety, navigation and conservancy powers, functions and duties of a concessionaire, including but not limited to:*
 - (i) *the nature and standard of navigational aids, buoys and beacons to be provided in a port;*
 - (ii) *the provision of lifeboats and lifesaving apparatus provided in a port;*
 - (iii) *the removal of wrecks; and*
 - (iv) *the conditions for the construction or expansion of a port;*

- (d) *requirement for the development of safety standards by a concessionaire in respect of the fitness of port works and operational equipment or any safety, navigation or conservancy function;*
- (e) *reports by a concessionaire in respect of port safety; and*
- (f) *the appointment and composition of port users committees and their powers, functions and duties.*

(3) Any regulation made under subsection (2) may include such incidental, supplementary or transitional provisions as may be necessary.

(4) A regulation in terms of this section may prescribe penalties for the contravention thereof or failure to comply herewith, of a fine or imprisonment for a period not exceeding two years.

Offences

4. *Any natural or juristic person who -*

- (a) *wilfully or negligently endangers the safety of human life, navigation or property in a port; and*
- (b) *contravenes a provision of this Act or a regulation made in terms of this Act,*

is guilty of an offence, and on conviction liable to a fine or imprisonment for a period not exceeding...or to both such fine and such imprisonment, or any other suitable punishment.